

JUN 18 1997

Federal Communications Commission
Office of Secretary

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules)	GEN Docket No. 90-314
to Establish New Personal Communications)	ET Docket No. 92-100
Services, Narrowband PCS)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act - Competitive)	
Bidding, Narrowband PCS)	

COMMENTS OF CELPAGE, INC.

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SUMMARY

Celpage urges the FCC to license the remaining, allocated Narrowband PCS on an MTA and regional basis only. BTAs are too small to support viable NPCS systems, and will increase inefficiencies and costs to applicants attempting to aggregate multiple BTA licenses. Nationwide licenses, however, will be far too large and costly for small and mid-size businesses to obtain at auction and build out. Many small businesses relied upon the upcoming availability of smaller license areas; that good faith reliance deserves consideration.

Eligibility restrictions for the paging response channels should remain in place. Paging companies are in a position to immediately put that spectrum to use in serving the public, and many have foregone the opportunity to compete in previous auctions in reliance upon the availability of those channels. Since the only parties requesting open eligibility are paging companies who would be eligible for these channels in any event, any "non-conforming" use they propose would be more appropriately addressed by waivers.

The Reserved Spectrum should not be channelized and licensed at this time. Much of the original allocation has not yet been auctioned. The FCC should license the remaining allocated channels, and give the industry time to develop, before "flooding the market" with the Reserved Spectrum.

Celpage supports simplifying the attribution rules and ownership requirements for NPCS applicants. Streamlining these rules will make it easier for applicants to understand them, and for the FCC to monitor compliance with them. Celpage also supports the FCC's proposed "small business" definitions, and the availability of bidding credits and installment payments.

Construction benchmarks should be retained for NPCS. While flexible benchmarks may

be more appropriate for a new service like NPCS than for existing services, applicants and the public need clear, understandable construction rules to ensure that NPCS spectrum is not warehoused.

Celpage supports the FCC's proposals for partitioning of NPCS licenses; however, Celpage is not certain that disaggregation is technically feasible for NPCS. At a minimum, the FCC should not permit disaggregation of the response channels.

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To: The Commission

COMMENTS OF CELPAGE, INC.

Celpage, Inc. ("Celpage"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these Comments in response to the Further Notice of Proposed Rule Making ("FNPRM")¹ in the above-referenced proceeding. In support hereof, the following is respectfully shown:

I. Statement of Interest.

Celpage is the parent company of Pan Am License Holdings, Inc., a Commercial Mobile Radio Service ("CMRS") licensee with facilities throughout the Commonwealth of Puerto Rico and the United States Virgin Islands. Celpage exclusively provides one-way paging services, under Parts 22 and 90 of the Rules, through a wide-area paging network which is connected to the local telephone network.

Like many paging companies, Celpage is interested in the development of narrowband personal communications services ("NPCS"), both as a prospective provider of NPCCS services,

¹ The FNPRM was released as part of a Report and Order and Further Notice of Proposed Rule Making, FCC 97-140 (released April 23, 1997).

and as an incumbent licensee who will almost surely compete with other carriers' NPCS offerings. Therefore, Celpage has standing as a party in interest in this proceeding.

II. Summary of the FNPRM.

The FNPRM proposes broad changes to the Commission's Rules governing the allocation and licensing of NPCS. Only those proposals which are addressed in these Comments are summarized here.

The FNPRM proposes a reallocation of the remaining NPCS channels that have been allocated and channelized, but not yet auctioned. The Commission proposes to eliminate licensing on a Basic Trading Area ("BTA") basis, and license these channels based on a combination of nationwide, regional and Major Trading Area ("MTA") service areas. See FNPRM at ¶ 31. Under the Commission's proposal, the two remaining 50 kHz pairs would be redesignated as nationwide channels. Id. Of the five 50/12.5 kHz pairs, one would be redesignated for nationwide licensing; three for regional licensing; and one for MTA licensing. Id. The four BTA-based 12.5 kHz response channels would be redesignated for regional licensing. Id. The Commission seeks comment on the effect of this proposed rechannelization on small businesses, as well as incumbent nationwide and regional NPCS licensees. Id. at ¶¶ 31-32. The FNPRM appears to indicate that the MTA-based response channels will remain allocated on an MTA basis. Id. at ¶ 40.

The Commission further proposes to channelize and license the one MHz of NPCS spectrum which is currently reserved (the "Reserved Spectrum"). Id. at ¶ 34. The Commission requests comment on a channelization plan for the Reserved Spectrum, and questions whether paired or unpaired channels should be created. Id. The Commission also seeks comment on

whether the current NPCS aggregation limit of three 50 kHz channels should be modified in light of the proposal to license the Reserved Spectrum. Id. at ¶ 35.

The FNPRM also proposes to lift the eligibility restrictions on the response channels; eligibility for those channels is currently limited to one-way paging licensees. Id. at ¶ 40. The Commission also proposes eliminating the restriction that these channels be limited to mobile-to-base communications. Id.

The Commission also proposes revising the construction benchmarks for NPCS licensees, by allowing NPCS licensees to make a showing of "substantial service." Id. at ¶ 44. The FCC questions whether the geographic coverage requirements imposed by the current Rules remain necessary if a "substantial service" coverage requirement is adopted. Id. If those coverage benchmarks are retained, the Commission asks whether they should be conformed to the benchmark periods for paging services. Id. at ¶ 45. Finally, the Commission questions whether to eliminate all coverage requirements for NPCS. Id. at ¶ 46.

The FNPRM proposes that eligibility for bidding credits and installment payments be available for "small businesses." Id. at ¶ 66. The Commission proposes a "two-tiered" approach to defining small businesses: a "small business" would be defined as one with gross revenues of not more than \$40 million; a "very small business" would be defined as one with gross revenues of not more than \$15 million. Id.

The FNPRM proposes to simplify the attribution rules for NPCS small businesses. In determining whether an applicant meets one of the small business definitions, the Commission proposes to consider the gross revenues of the applicant, its affiliates, and its controlling principals. Id. at ¶ 70. The gross revenues of an applicant's affiliates and controlling principals

would be attributed to the applicant. Id. The Commission proposes to determine "control" of an applicant based on both *de jure* control (e.g., 50.1% of voting stock) and *de facto* control, to be determined on a case-by-case basis. Id. at ¶ 71. The Commission further proposes to eliminate the current rule provision under which no attributable investor in a small business could have individual net worth in excess of \$40 million. Id. at ¶ 71.

Consistent with the proposal to adopt two classes of small businesses, the FNPRM proposes a "two-tiered" structure for bidding credits. Small businesses with gross revenues of not more than \$40 million for the preceding three years would be entitled to a 10% bidding credit; very small businesses meeting the \$15 million gross revenue limitation would be entitled to a 15% bidding credit. Id. at ¶ 74. Also, the FNPRM proposes that "very small businesses" be entitled to a lower interest rate on installment payments than "small businesses." Id. at ¶ 80.

The FNPRM proposes a partitioning scheme for NPCPS similar to that adopted for broadband PCS. Id. at ¶ 88. The FNPRM proposes that NPCPS licensees would be permitted to partition portions of their service areas to any entity qualified to hold an NPCPS license, although it questions whether partitioning should be limited to rural telephone companies, as was the case for the initial broadband PCS rules. Id. The Commission proposes that partitioning be permitted at any time during the license term, and that partitionees would hold their partitioned licenses for the remainder of the partitioner's 10-year license term. Id. at ¶¶ 89-90. The Commission also proposes that partitioning be permitted based on any geographic area defined by the parties. Id. at ¶ 91. The Commission seeks comment on the construction requirements applicable to partitioned licenses, and proposes two options: one by which the partitionee certifies that it will meet the requirements for the partitioned area and the partitioner certifies that it will meet the

requirements in the area it retains; the other by which the original licensee/partitioner certifies that it will meet the requirements for the entire area. Id. at ¶ 92. The Commission also proposes to apply its unjust enrichment provisions where small businesses seek to partition to entities that do not qualify for bidding credits and installment payments (or that qualify for less favorable credits and installment plans). Id. at ¶¶ 93-95.

The FNPRM seeks comment on the feasibility of spectrum disaggregation for NPCS, including whether minimum standards for disaggregation should be required. Id. at ¶ 96. The Commission seeks comment on the respective construction obligations that should be imposed on parties to a disaggregation arrangement, id. at ¶ 97; and how to apply its unjust enrichment provisions to disaggregation by small businesses. Id. at ¶¶ 98-99.

The FNPRM proposes to modify the ownership disclosure requirements for future NPCS applications, to eliminate the requirement that all attributable stockholders in the applicant list all businesses in which they own at least 5%, and to eliminate the requirement that partnership applicants submit copies of their partnership agreements with the "short form" application. Id. at ¶¶ 101-102.

III. The Commission Should Rechannelize the Allocated NPCS Spectrum to Regional and MTA Licenses Only.

Celpage concurs with the Commission and commenters that BTA-based licensing will generally not provide licensees with a sufficient service area, and will increase the burdens on licensees in attempting to aggregate BTAs at auction. See FNPRM at ¶¶ 27, 29. For example, in order to provide seamless NPCS coverage to the Commonwealth of Puerto Rico, Celpage would need to obtain two co-channel BTA licenses; the same coverage could be provided with a single MTA license. Celpage therefore supports the Commission's proposal to allocate the channels

currently allocated on a BTA basis to larger service areas.

Nonetheless, Celpage respectfully submits that the Commission's proposal to create more nationwide channels will have the effect of precluding smaller businesses from effectively competing for NPCS licenses. Many smaller and mid-sized companies, including Celpage, did not participate in the previous NPCS auctions. Small and mid-sized companies generally lack the ability to compete against the largest firms for large geographic areas. Moreover, recent requests for modification of the FCC's PCS license payment requirements strongly suggest that PCS licensees are having difficulty paying for their FCC licenses, while trying to build and operate wide-area networks. See Public Notice, DA 97-679 (released June 2, 1997).

Smaller entities relied on the upcoming availability of smaller, more manageable service areas, and saved their resources for future auctions which would provide them with more realistic opportunities to participate. The Commission's proposal to create more nationwide and regional licenses, while decreasing the amount of available MTA licenses and eliminating BTA licenses, will frustrate the good faith business plans of those smaller entities and have the (presumably unintended) effect of limiting participation by small businesses in the provision of NPCS services.

Celpage therefore recommends adopting a channelization plan for the remaining channels that combines regional and MTA licenses. A combination of regional and MTA licensing appropriately balances the needs of larger carriers, or consortia of carriers, to establish wide-area networks, while retaining genuine opportunities for entry by smaller businesses.

MTA licensing will allow for service areas that companies other than the largest firms can realistically compete for and build out. Conversely, MTAs are still large enough to allow

license winners to offer competitive, wide-area NPCS services, without the inefficiencies and costs attendant to bidding for multiple BTAs. MTAs may well be the minimum viable service area for advanced services such as NPCS, yet they are not so large as to preclude entry by small or mid-sized companies into this developing industry. Additionally, to the extent that the Commission retains the current eligibility restrictions for the response channels, those channels should be licensed on an MTA basis, so that they can be more readily integrated with existing 900 MHz paging operations.

Channelizing some of the remaining channels on a regional basis is also advisable. Issuing some of the remaining licenses on a regional basis will allow for economies of scale that may not be possible with smaller license areas. Additionally, the Commission's proposed partitioning rules will give smaller companies greater flexibility in forming bidding consortia or joint ventures than those entities had at the time of the prior regional NPCS auction, and may therefore enable small businesses to compete effectively for those license areas.

IV. The Reserved Spectrum Should Not be Opened for Licensing at this Time.

Celpage respectfully submits that the Commission's proposal to channelize and license the Reserved Spectrum is premature. The NPCS industry is still in the developmental stages, and the demand for NPCS services is still uncertain. For example, without a history of operational NPCS systems, it is difficult to respond to the FNPRM's queries as to whether channelizing the Reserved Spectrum into larger blocks would be appropriate or useful. Moreover, there is still a significant amount of spectrum from the initial two MHz allocation to be licensed; auctions have not yet been held for the current "MTA," "BTA" and "response" channels.

Celpage submits that the Commission should rechannelize and auction the remaining, previously-allocated spectrum before deciding issues connected to the Reserved Spectrum. Merely placing more spectrum "on the block" for auction is contrary to the Commission's statutory auction authority, and disserves the public interest. Nothing in Section 309(j) instructs the Commission to ignore good spectrum management policies. To the contrary, that statutory provision, by requiring the Commission to make sure that new services are rapidly deployed, reminding the Commission of its obligations to avoid mutual exclusivity, and prohibiting the Commission from basing allocation decisions on projected auction revenues, reaffirms the Commission's core obligation to license radio facilities in the public's interest. See 47 U.S.C. § 309(j).

Creating a spectrum "glut" does not meet those statutory directives. For a fledgling service such as NPCS, licensing too much spectrum immediately may prevent any single licensee from earning a return on its investment, potentially depriving the public of new and innovative services. Again, the many recent requests for relief from the FCC's PCS license payment requirements surely suggest that the industry is having difficulty finding the capital to build out the spectrum that the FCC has *already* licensed. See Public Notice, DA 97-679, *supra*. Moreover, making excess spectrum available for licensing may skew auction results, leading to either a "gold rush" mentality on the part of applicants (as may have been the case for many in the first IVDS auction) or bids that substantially undervalue the offered channels (as was apparently the case in the recent WCS auction).

Celpage respectfully submits that the more reasoned approach would be to proceed with licensing the remaining allocated channels, and providing the NPCS industry with an

opportunity to establish itself somewhat, before licensing the Reserved Spectrum.

**V. The Attribution Rules and Ownership Disclosure
Requirements Should be Simplified.**

Celpage supports the Commission's proposal to simplify the NPCCS attribution rules for small businesses, and to conform the rules to those used in other contexts. The current attribution rules, some of which were adopted in the context of preferential procedures for minority and women-owned businesses (that may or may not have also been small businesses), are unnecessarily complex. Attribution rules are necessary to ensure that only *bona fide* small businesses are permitted to take advantage of the benefits intended for them; however, the more complex those rules are, the more difficult it becomes for applicants to understand them and the Commission to enforce them.

Celpage therefore agrees that, in determining an applicant's eligibility as a small business, the Commission should attribute the average gross revenues, for the past three years, of the applicant, its affiliates, and its controlling principals. The Commission's proposal in this regard correctly focuses on the ability of a party to exercise control over the applicant. "Affiliates" should be defined as proposed in Appendix B to the FNPRM. "Controlling principals" should be distinguished from "attributable investors;" the mere fact that an entity is considered an "attributable investor" (*i.e.*, one holding 5% or more of the equity of an applicant) does not make that entity a controlling force or real party in interest behind the applicant. While such investors should be disclosed, Celpage submits that only those principals in a position to control the applicant should be counted in determining an applicant's small business status. *De jure* control should be defined, as the Commission suggests, by ownership of 50.1% of an applicant's voting stock. Celpage submits that *de facto* control may be demonstrated by several

indicia, including those listed at Paragraph 71 of the FNPRM. Where no party controls more than 50% of an applicant's stock, the Commission should look to the parties who have *de facto* control of the applicant, using the factors listed in the FNPRM, as well as those factors developed in long-standing Commission case law. See, e.g., Intermountain Microwave, cite.

Celpage also supports the Commission's proposal to streamline the ownership reporting requirements for NPCS applications. In particular, the requirement that an applicant list all businesses in which any 5% or greater stockholder of the applicant holds a 5% or greater interest is unnecessarily burdensome. Such an overly-broad disclosure requirement is likely to chill legitimate institutional investment in NPCS applicants, without countervailing benefits.

VI. Coverage Requirements are Necessary.

Celpage respectfully submits that the Commission should retain the current construction benchmarks for NPCS. The five and ten year coverage benchmarks for NPCS should not be conformed to the three and five year benchmarks for paging. Paging is a well-established industry; the technology is mature and equipment is readily available. The paging market is also highly competitive and many geographic areas are heavily encumbered; if a paging geographic licensee cannot meet strict benchmarks, within relatively brief periods of time, it is imperative that that geographic licensee not be permitted to block expansion by incumbents or otherwise warehouse channels for which others have a proven need. In contrast, NPCS is a young service; it remains largely untried in the market. Providing longer benchmark periods for NPCS will provide participants in this new industry the necessary flexibility to design their systems most efficiently.

The need for flexibility, however, does not justify an elimination of construction

requirements. While warehousing may be less of a threat where licensees have paid large sums of money for their licenses, the Commission nonetheless has an obligation to ensure that spectrum does not lie fallow. Indeed, one of the overriding goals of Section 309(j) is "the rapid deployment of new technologies and services to the public." See 47 U.S.C. § 309(j)(3)(A). To this end, Congress specifically instructed the Commission to adopt performance standards for licenses obtained through auction. See 47 U.S.C. § 309(j)(4)(B). Reasonable construction requirements further the statutory goal of expediting service to the public.

For this reason, while a "substantial service" alternative might be appropriate for a new and developing service like NPCS (in addition to the existing coverage benchmarks), that alternative should not be adopted without a clearer statement of what will constitute "substantial service." Such a vague requirement is readily susceptible to abuse, and will be difficult for the Commission to enforce. Without standards to which to hold licensees, a "substantial service" alternative would allow speculators and warehousers an opportunity to maintain their licenses without any significant investment in providing services to the public. Conversely, *bona fide* NPCS licensees are entitled to "rules ... that are reasonably comprehensible to [people] of good faith" defining the conduct that is required of them to maintain their licenses. See, e.g., McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (citations omitted). Unless the Commission can devise a "substantial service" showing that provides licensees and the public with some certainty as to the requirements governing NPCS construction, it should leave the current geographic and population benchmarks unaltered.

**VII. Eligibility Restrictions for the Response Channels
Must be Maintained.**

The paging industry has patiently waited for the FCC to license the 900 MHz "talk-back" channels for several years now. In the interim, there have been no new spectrum allocations for paging, *and*, the FCC has imposed a licensing freeze on new paging grants. To change the rules now, and open those response channels to anyone, whether they've operated paging systems or not, is entirely unfair and will ultimately prove counterproductive.

Paging system operators *alone* are most likely to put those channels to immediate use, since they would be paired with constructed and operational paging systems. Paging licensees also have reliance interests in this spectrum: many paging operators "bowed out" of previous NPCS auctions, since the FCC had promised that these channels would be available to them. The market size and channelization made them an inherently better choice for many paging systems. The reasonable reliance of those paging licensees must not be defeated by retroactive rule making. *See, e.g., Yakima Valley Cablevision v. FCC*, 794 F.2d 737, 745-746 (D.C. Cir. 1986) ("When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief").

The FCC should not now change the eligibility rules without any public interest justification. The FNPRM states that eliminating the eligibility restrictions will "increase competition for these channels." FNPRM at ¶ 40. To the extent that the Commission's justification is to drive up auction prices, that is unlawful. *See* 47 U.S.C. § 309(j)(7)(A).

That justification may be factually misguided as well. Oddly, the only requests to open these channels to all comers are made by two paging licensees, who would be eligible to bid on them in any event. *See FNPRM* at ¶¶ 37-39. The record, as summarized by the FNPRM, reveals

no interest in obtaining these channels by *any* party which does not already hold paging licenses.

Id. To the extent that one or two paging licensees - who are already eligible for the response channels - would like to use them for purposes other than as "talk-back" channels for their existing paging frequencies, those individualized uses would be more appropriately addressed through requests for waiver than through wholesale reallocation of the channels.

VIII. Partitioning and Disaggregation.

Celpage generally supports the Commission's proposal to allow NPCS licensees to partition and disaggregate their channels. For other auctionable services, the Commission has noted the benefits that partitioning affords in terms of enhancing licensee flexibility to tailor their service offerings in response to public demand, and promoting small businesses entry in telecommunications industries. See, e.g., Second Report & Order and Further Notice of Proposed Rule Making in WT Docket No. 96-18 and PP Docket No. 93-253, FCC 97-59, ¶¶ 203, 209 (released February 24, 1997). There does not appear to be any principled reason to treat NPCS licensees differently than licensees in other services with regard to partitioning. Partitioning should be permitted on any geographic area determined by the parties, and any party eligible to hold an NPCS licensee should be permitted to become a partitionee. As proposed, partitionees should hold their licenses for the remainder of the partitioner's ten-year license term.

Disaggregation may hold similar benefits for NPCS licensees; however, Celpage is not certain that the Commission's proposal to allow disaggregation for these channels is technically feasible. In particular, Celpage is concerned that the unpaired 12.5 kHz response channels may not be suitable for disaggregation. In the Commission's paging licensing and auction docket, a

number of commenters responding to the Further Notice of Proposed Rule Making voiced skepticism that viable services could be provided through disaggregated portions of 25 kHz paging channels. See, e.g., Comments of Personal Communications Industry Association at 8; Comments of Metrocall, Inc. at 23. The NPCS response channels are one-half the bandwidth of standard paging channels; Celpage doubts that such small channels could be further divided and still provide useful services to subscribers. Consequently, even if the Commission permits disaggregation for the 50 kHz pairs, the 50/12.5 kHz pairs, and the 50 kHz unpaired channels, Celpage does not believe it is advisable to allow disaggregation of the response channels at this time. The Commission's waiver procedures provide sufficient flexibility in the event that a licensee can demonstrate a technically viable disaggregation proposal.

Celpage supports the Commission's proposals to allow the parties to partitioning arrangements the choice of one of two alternatives for meeting the construction benchmarks; if disaggregation is permitted, Celpage suggests that similar provisions be adopted for disaggregation. Celpage supports the Commission's proposed application of the general Part 1 "unjust enrichment" provisions to all NPCS transactions, including partitioning arrangements and, if permitted, disaggregation arrangements. For partitioning, the relative value of the area partitioned should be determined based upon the population of the partitioned area compared to the area retained by the initial licensee. If disaggregation is permitted, the relative value of the disaggregated channel should be based upon the amount of spectrum granted to the disaggregatee compared to the amount retained by the original licensee.

IX. Provisions for Small Businesses.

Celpage generally favors adoption of the small business designations in the FNPRM and

the availability of bidding credits and installment payments for qualified small businesses. Celpage requests, however, that if the FCC liberalizes the broadband PCS installment payment obligations in its recent inquiry, it should adopt similar installment payment rules for NPCS licensees.

Conclusion

WHEREFORE, the foregoing premises considered, Celpage respectfully requests that the Commission adopt modified rules for narrowband personal communications services in accordance with these Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Regina Wingfield, a secretary in the law firm of Joyce & Jacobs, Attys. at Law, L.L.P., certify that on this 18th day of June, 1997, copies of the foregoing Comments of Celpage, Inc. were sent via first class U.S. mail, postage prepaid, to the following:

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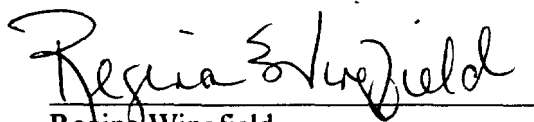
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